



# IP Literature Watch

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This newsletter contains an overview of recent publications concerning intellectual property issues. The abstracts included below are as written by the author(s) and are unedited.

## IP & Antitrust

### **Intellectual property and competition**

Herbert J. Hovenkamp (University of Iowa – College of Law)

*This essay is a chapter in the Research Handbook on the Economics of Intellectual Property (Edward Elgar, Peter Menell, David Schwartz, & Ben Depoorter, eds. Forthcoming).*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2569129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569129)

A legal system that relies on private property rights to promote economic development must consider that profits can come from two different sources. First, both competition under constant technology and innovation promote economic growth by granting many of the returns to the successful developer. Competition and innovation both increase output, whether measured by quantity or quality. Second, however, profits can come from practices that reduce output, in some cases by reducing quantity, or in others by reducing innovation.

IP rights and competition policy were traditionally regarded as in conflict. IP rights create monopoly, which was thought to be inimical to competition. By contrast, competition policy values free entry and asset mobility, which IP rights limit in order to create incentives. Today our view of this relationship is more complex. First, most IP rights are insufficient to produce durable monopoly, although they do facilitate product differentiation. Second, we tend to see IP rules as creating a property rights system in which competition exists for the property rights themselves. Firms compete by innovating and appropriating whatever payoffs they are able to capture, including IPRs. Third, we define competition in terms of output or welfare rather than simple rivalry. A market structure or practice that increases output is more "competitive" than a lower output alternative, even though the amount of daily rivalry among firms is less. For example, output in the cellular phone market is much higher because hardware, software, and telecommunications links are all networked by cooperative agreements and standard setting.

Under conventional neoclassical assumptions, both innovation and competition increase output, whether measured by the number of units or their quality.

At the same time, however, excessive IP protection limits competition by reducing asset mobility further than necessary to facilitate innovation. Excessive antitrust enforcement can also limit asset mobility by benefiting select businesses at the expense of consumers. The policy trick is to find the "sweet spot" where the aggregate effects of IP and competition policy are optimized.

# IP & Innovation

## Does the patent system promote scientific innovation? Empirical analysis of patent forward citations

Tayla Ponchek (University of Haifa, Faculty of Law)

*Albany Law Journal of Science and Technology, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2569281](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569281)

This article sets out to examine the question whether the patent system should continue incentivizing innovation produced by an individual inventive entity in light of the increasing need for collaboration in scientific research and development (R&D).

The patent system views innovation as an individual endeavor. The underlying justifications of the patent system place significant emphasis on the individual inventive entity. This perception is contrary to the way current innovation theories view innovation production and to how scientific R&D is conducted in practice. Current innovation theories view collaboration as central to the innovation process, as the ever growing complexity of scientific R&D dictates the need for scientists to work in collaboration as one researcher or research organization can no longer hold all the expertise and resources needed to advance science and produce innovation.

This article uses data collected on stem cell research, mainly patent forward citations, as these citations serve as a proxy for the innovative level of the protected technology. As this Article further discusses, innovation in the patent system focuses on the individual inventive entity. Nevertheless, the analysis presented here shows that higher rates of innovation are achieved through collaborative R&D activities as opposed to individual endeavors.

The article argues that by focusing on incentivizing the individual inventive entity, the patent system misrepresents how innovation is produced, the same innovation it seeks to promote. It concludes thus with an appeal to policymakers to address the disparity between how the patent system views innovation production and how scientific innovation is produced in practice.

## Measuring innovation

Michael J. Cooper (University of Utah – David Eccles School of Business)

Anne Marie Knott (Washington University in St. Louis – John M. Olin Business School)

Wenhao Yang (University of Utah)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2572815](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572815)

Innovation is vital to firm value. Accordingly a number of recent papers in the finance literature have begun examining the impact of governance and other firm measures on innovation. To date these papers have used patent-based measures to capture innovation. However such measures ignore the 50% of firms who do R&D but don't patent their innovations. To address that concern, we examine the feasibility of using a more universal measure of innovation from the management literature — the firm's research quotient (RQ), defined as the firm-specific output elasticity of R&D. We show that RQ is more strongly associated with firm value than previous patent-based measures. Given RQ's universality advantages and stronger relation with firm value relative to patents, we propose using RQ in future studies of innovation.

## IP & Litigation

### **The misinterpretation of eBay v. MercExchange and why: an analysis of the case history, precedent, and parties**

Ryan T. Holte (Southern Illinois University School of Law)

*Chapman Law Review*, 2015, *Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570944)

eBay v. MercExchange, 547 U.S. 388 (2006) is approaching a decade of citation and, in that time, the landscape for injunctions in patent infringement cases has changed dramatically. Can revisiting the case give us a better understanding of how the standards for injunctions should be understood post-eBay, perhaps in contrast to how they are understood? The purpose of this article is to extract that detail regarding the eBay injunction denial from primary sources. This research focuses solely on the injunction issue post-trial to case settlement. The article next assesses the impact of eBay on district courts, inventors, news stories, intellectual property investors, and others over the last decade. Finally, based in part on a review of court opinions considering permanent injunctions since eBay, and court citations to eBay's concurring opinions by Chief Justice Roberts and Justice Kennedy, the article argues that the case has largely been misinterpreted by district courts and others for various reasons including: improper reliance on Justice Kennedy's concurrence; misleading media coverage; eBay's public relations efforts to spin media attention in its favor; a district court judge generally biased against patent owners and uniquely concerned with the wide disparities between the parties, the motives of MercExchange, and the vast consequences an injunction may bring against the world's largest auction marketplace; and the fact that the case settled after the district court's second denial of an injunction but before the Federal Circuit could revisit the issues. The article concludes by emphasizing that eBay should be cited for what the Court actually held, and not for how the case has been (mis)interpreted these last ten years.

### **IP litigation in United States District Courts: 1994 to 2014**

Matthew Sag (Loyola University Chicago School of Law)

*Iowa Law Review*, *Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570803)

This article undertakes a broad-based empirical review of Intellectual Property (IP) litigation in United States federal district courts from 1994 to 2014. Unlike the prior literature, this study analyzes federal copyright, patent and trademark litigation trends as a unified whole. It undertakes a systematic analysis of more than 190,000 individual case filings and examines the subject matter, geographical and temporal variation within federal IP litigation over the last two decades.

This article makes a number of significant contributions to our understanding of IP litigation. It analyzes time trends in copyright, patent and trademark litigation filings at the national level, but it does much more than simply count the number of cases; it explores the meaning behind those numbers and shows how in some cases the observable headline data can be positively misleading. Exploring the changes in the distribution of IP litigation over time and their regional distribution leads to a number of significant insights, these are summarized below. Just as importantly, one of the key contributions of this article is that it frames the context for more fine-grained empirical studies in the future. Many of the results and conclusions herein demonstrate the dangers of basing empirical conclusions on narrow slices of data from selected regions or selected time periods.

Some of the key findings of this study are as follows:

First, the rise of Internet file-sharing has transformed copyright litigation in the United States. More specifically, to the extent that the rate of copyright litigation has increased over the last two decades, that increase appears to be entirely attributable to lawsuits against anonymous Internet file sharers. These

lawsuits largely took place in two distinct phases: the first phase largely consisted of lawsuits seeking to discourage illegal downloading; the second phase largely consists lawsuits seeking to monetize online infringement.

Second, in relation to patent litigation, the apparent patent litigation explosion between 2010 and 2012 is something of a mirage; however there has been a sustained patent litigation inflation over the last two decades the extent of which has not been fully recognized until now. The reason why this steady inflation was mistaken for a sudden explosion was that the true extent of patent litigation was disguised by permissive joinder.

Third, in relation to the geography of IP litigation, it appears that filings in copyright, patent and trademark litigation are generally highly correlated. The major exceptions to that correlation are driven by short term idiosyncratic events in copyright and trademark litigation — these are discussed in detail — and by the dumbfounding willingness of the Eastern district Texas to engage in forum selling to attract patent litigation. The popularity of the Eastern District of Texas as a forum for patent litigation is a well-known phenomenon. However, the data and analysis presented in this study provides a new way of looking at the astonishing ascendancy of this district and the problem of form shopping in patent law more generally.

### **Association for Molecular Pathology v. Myriad Genetics, Inc.: progress by principles**

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*Journal of Health Care Law & Policy*, Vol. 18, No. 1, 2015

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2578639](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578639)

In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, the Supreme Court considered whether human genes are patentable under the Patent Act of 1952. Originally enacted in 1790, the Act allows patents to be granted on any new and useful process, machine, manufacture, or composition of matter, barring a judicially created exception for laws of nature, natural phenomena, and abstract ideas. These three naturally occurring things are nonpatentable because they create the foundation of scientific and technological work. In *Myriad*, the Court unanimously held that isolated DNA is nonpatentable, since such DNA is naturally occurring phenomena under the exception, and merely isolating it is not sufficient to make it otherwise. However, the Court held that complimentary DNA (“cDNA”) is patentable, as it is not similarly naturally occurring.

The Court reached this conclusion by following precedent in a number of ways, most notably in its emphasis on, and analysis of, the principles behind both patent law’s protections and the law’s exception regarding patentable subject matter. In doing so, the Court accomplished precisely those principles’ objective: striking the balance of patent law’s double-edged sword by promoting further scientific progress while also proscribing the improper restriction of science and technology’s basic tools. The correct decision in *Myriad* was a colossal win for science, public health, and personalized medicine, and it came at the cost of a mere slap on the wrist for the biotech industry.

### **Protecting the boundaries: unclaimed consideration in the patentee's social contract**

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*Tulane Journal of Technology & Intellectual Property*, Volume 18, Forthcoming

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2577925](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577925)

This article argues that the primary value society receives in the patentee’s social contract is not new inventions, but “unclaimed consideration.” Unclaimed consideration takes many forms: additional innovations to improve on the patented invention; additional innovations created through efforts to design around the patented invention; innovations created by losers in the patent race; innovations informed by the unclaimed technical information in patents; commercialization of the patented invention or these other innovations; and the signals that patents give to investors regarding the value of a company or research lab. This unclaimed consideration is not necessarily a positive externality or “spillover,” because the inventor herself may well capture the value of the unclaimed consideration. And while there are many

schools of patent scholarship engaged in spirited debate regarding how patents serve (or fail to serve) society, this article is the first to recognize and map the growing consensus among modern patent theories that this unclaimed consideration is of primary value and importance to society. Indeed the majority of claimed inventions are never commercialized or licensed, and so granting the patent monopoly in most cases can only be justified by society receiving some other form of consideration. The courts should therefore guard the boundaries of patent claims to avoid the perverse result of allowing the thicket of claimed inventions to stifle the development of unclaimed consideration. The article demonstrates this point through a case study of *Siemens Medical Solutions v. Saint-Gobain Ceramics & Plastics*, in which the Federal Circuit decided that an accused product can equivalently infringe a patent even after it is declared by the Patent and Trademark Office to be separately patentable and non-obvious over the asserted patent. The majority of a sharply divided court thereby allowed a broad doctrine of equivalents to ensnare unclaimed consideration, relying on reasoning myopically wed to the belief that the sole way in which the patent laws promote progress is by incentivizing claimed inventions. The courts should instead lean on the side of protecting unclaimed consideration, which modern patent theory recognizes is the substantial return society ought to receive in return for the patent grant.

## IP Law & Policy

### Patent asymmetries

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*UC Davis Law Review, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2574977](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574977)

Everyone knows that it is far too easy to get a (bad) patent. Fingers often point to the U.S. Patent and Trademark Office (PTO), which is often criticized for making awful patenting decisions. Legal scholars have offered several reasons for the quality problem, including low substantive standards for patentability and problems with the PTO's inner workings, decision-making, and policy choices.

This Article offers a very different explanation for the patent quality problem. Drawing attention to what happens inside the PTO is clearly the correct locus; however, any serious headway toward improving patent quality must focus more directly on patent examination. My basic claim is that low-quality patents issue primarily because of a confluence of three asymmetries — proof, information, and legal — that exist in the current patent examination paradigm. I explain how these asymmetries tip the scales of patentability so far in the applicant's favor that anyone who seeks a patent on anything usually gets one. I propose a new patent examination regime which would eliminate the three asymmetries, derail frivolous filings, and make a patent grant far from guaranteed. Rebalancing the scales of patentability would improve patent quality and promote broader goals of patent policy.

### Promoting 'academic entrepreneurship' in Europe and the United States: creating an intellectual property regime to facilitate the efficient transfer of knowledge from the lab to the patient

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*Duke Journal of Comparative & International Law, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2571103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571103)

In 2014, the European Commission announced the launch of a study of knowledge transfer by public research organizations and other institutes of higher learning “to determine which additional measures might be needed to ensure an optimal flow of knowledge between the public research organisations and business thereby contributing to the development of the knowledge based economy.” As the European Commission has recognized, the EU needs to take action to “unlock the potential of IPRs [intellectual property rights] that lie dormant in universities, research institutes and companies.” This article builds on our earlier work on structuring efficient pharmaceutical public-private partnerships (PPPPs) but focuses

on the regulatory infrastructure necessary to support the efficient commercialization of publicly funded university medical research in both the European Union and the United States. Our comparative analysis of the EU and U.S. approaches to translational medicine shows that there are lessons to be shared. The EU can apply the experiences from the U.S. Bayh-Dole Act and PPPs in the United States, and the United States can emulate aspects of the open innovation aspects of the European Innovative Medicines Initiative and the tighter patenting standards imposed by the European Patent Office. Thus, a secondary purpose of this article is to suggest amendments to the U.S. laws governing the patenting and licensing of government-funded technology to prevent undue burdens on the sharing of certain upstream medical discoveries and research tools.

### **Giving the Federal Circuit a run for its money: challenging patents in the PTAB**

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*Notre Dame Law Review, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2572647](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572647)

In 2012, Congress changed the patent landscape in a crucial way. In an attempt to deal with the perception that low-quality patents and suits instituted by nonpracticing entities (“trolls”) were imposing a heavy tax on innovation, the legislature established the Patent Trials and Appeal Board (PTAB) to review the validity of patent claims under three new inter partes procedures. These procedures have proved extremely popular and startlingly effective at weeding out bad patents. But with a cancellation rate of close to 80% of the claims tried, the PTAB has been heavily criticized as a “death squad,” the place where patents go to die. This study looks beyond the numbers to examine the decisions themselves. Seen from that perspective, I argue that the high rate of cancellations is unexceptional. Challengers come forward only when they have strong cases; many claims rise or fall together; and the same claim may be the subject of multiple challenges, be it by different parties, or by the same party using different prior art or asserting different theories of invalidity.

My main objective is not, however, to defend the PTAB. Rather, it is directed at institutional questions, to gauge how well the PTAB functions to ameliorate the effect of Federal Circuit’s isolation as the sole court hearing patent appeals: to see whether PTAB decisions provide a basis for the Federal Circuit to consider new perspectives and to examine whether the decisions will furnish better guidance to the examining corps and to the district courts. A second goal is to draw greater academic attention to the potential these procedures have for changing the patent system and to provoke discussion — outside the emerging PTAB bar — on how they ought to operate. In particular, the statute layers inter partes review in a specialized agency under appellate review in a specialized court. I offer some thoughts on how authority over patent jurisprudence should be allocated between these two centers of expertise. The Federal Circuit was an important experiment in judicial administration; these procedures represent a further experiment in structuring the administrative state.

## Copyright Law

### **Intellectual property law hybridization**

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*University of Colorado Law Review, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576021](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576021)

Traditionally, patent and copyright laws have been viewed as separate bodies of law with distinct utilitarian goals. The conventional wisdom holds that patent law aims to incentivize the production of inventive ideas, while copyright focuses on protecting the original expression of ideas, but not the underlying ideas themselves. This customary divide between patent and copyright laws finds some support in the Constitution’s Intellectual Property Clause, and Congress, courts, and scholars have largely perpetuated it in enacting, interpreting, and analyzing copyright and patent laws over time.

In this Article, I argue that it is time to partially breach this traditional divide. I propose doing so by adjusting both copyright and patent law defenses and remedies so that each body of law more explicitly recognizes and facilitates the purposes of the other. In particular, in some cases copyright law's fair use defense would be well served incorporating patent law principles relating to obviousness and novelty in assessing whether some technology's use of copyrighted works is a fair use. And injunctive relief standards under patent law should expressly take into account how granting certain patent law remedies may affect copyrightable creative activities.

Several reasons justify abandoning the conventional divide between copyright and patent laws in pursuit of such intellectual property law hybridization. First, the traditional divide fails to take into account the increasingly interdependent relationship between creative and innovative efforts prevalent in today's world; technological innovation often triggers creative efforts, and vice-versa. Thus, adjusting defenses and remedies under each body of law in order to better adapt to these realities would help facilitate them, thereby providing additional incentives to create and invent that arguably offset any weakening of incentives brought about through such hybridization. Second, the traditional divide ignores much modern neurobiological, psychological, and cultural research, which shows that the creative processes that lead to both copyrightable expression and patentable invention are often so intertwined as to make neatly dividing and encouraging them under separate bodies of law difficult. Given these interrelationships, relaxing each body of law's remedial harshness in some cases should actually spur creative and inventive activities. And finally, some scholarship has recently suggested that, based on the historical record, the Intellectual Property Clause of the Constitution is best interpreted as assuming the interdependent nature of creative and inventive activities; updating each body of law to better reflect these interdependencies is thus also warranted as a constitutional matter. These reasons collectively suggest that calibrating each of copyright and patent law to the interdependent nature of many creative and inventive activities better aligns each body of law with their common utilitarian theoretical heritage. The Article concludes by suggesting that hybridization efforts may be warranted not only within the intellectual property realm, but within the law more generally.

### **Copyright's private ordering and the 'Next Great Copyright Act'**

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*29 Berkeley Technology Law Journal 1595 (2014)*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2574985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574985)

Private ordering plays a significant role in the application of intellectual property laws, especially in the context of copyright law. In this Article, I highlight some of the dominant modes of private ordering and consider what formal copyright law should do, if anything, to engage with private ordering in the copyright space. I conclude that there is not one single approach that copyright law should take with regard to private ordering, but instead several different approaches. In some instances, the best option is for the law to get out of the way and simply continue to provide room for various approaches to flourish. In other contexts, the copyright statute should actively support private ordering efforts that may be jeopardized by the current regime. Private ordering may also highlight areas where the law is in need of reform. This is perhaps most noticeable in the context of fair use which has led to the proliferation of much of the private ordering. The combination of the unpredictability and expense of fair use litigation combined with potentially high statutory damages has created a series of risk-averse litigation-avoidance practices and an underutilization of fair use. Legislation may be necessary to prevent a lock-in effect of some of these industry practices and norms. In particular, courts should be barred from using these customs to set the boundaries of fair use. Revisions to the Copyright Act could also address some of the uncertainty surrounding fair use and facilitate the use of works in instances that we would like to encourage. In recent years, copyright holders have used technology and contracts to greatly limit what users can do with copyrighted works and even with uncopyrightable elements of those works. Revisions to copyright law should engage with these private efforts and protect a significant fair use zone. Copyright's private ordering also reveals some areas of agreement which merit codification, such as faculty ownership of course materials and scholarship. Copyright law does not operate in a vacuum and any major revisions to copyright law must take into consideration the practices that have developed in its wake. As we look forward to a Copyright Act for the twenty-first century, Congress must not only consider ways to limit

online piracy, but also how to protect the public's vital space to engage with, comment on, and rework copyrighted material in light of the myriad practices that have developed in the shadow of the 1976 Act.

### Copyright and good faith purchasers

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568029](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568029)

Good faith purchasers for value — individuals who unknowingly and in good faith purchase property from a seller whose own actions in obtaining the property are of questionable legality — have long obtained special protection under the common law. Despite the seller's own actions being tainted, such purchasers obtain valid title themselves and are allowed to freely alienate the property without any restriction. Modern copyright law, however, does just the opposite. Individuals who unknowingly and in good faith purchase property embodying an unauthorized copy of a protected work are altogether precluded from subsequently alienating such property, or risk running afoul of copyright's distribution right. This Article examines copyright law's anomalous treatment of good faith purchasers and shows how the concerns motivating the good faith purchaser doctrine in the common law, relating to the free alienability of property and the informational burdens that consumers might have to unduly bear, carry over to the principal settings where modern copyright law operates. It then develops an analogous doctrine for copyright law that would balance the concerns of copyright owners and innocent consumers. Under this doctrine good faith purchasers for value of objects embodying infringing content would obtain good title to such objects as long as they acquire the object from its manufacturer prior to a judicial determination of infringement against the manufacturer, i.e., so long as the manufacturer's title is merely voidable and not void. The Article illustrates how such a doctrine would work in practice, and shows how its core elements remain compatible with copyright law's existing analytical structure and normative ideals.

## IP & Licensing

### Exhausting patents

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*63 UCLA Law Review*, 2016, Forthcoming

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2579959](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579959)

A bedrock principle of patent law — patent exhaustion — proclaims that an authorized sale of a patented article exhausts the patentee's rights with respect to the article that has been sold. Over one hundred and fifty years of case law, however, has produced two conflicting notions of patent exhaustion, one considering exhaustion to be mandatory regardless of whether the patentee subjects the sale to express patent restrictions, and one treating exhaustion as a default rule that applies only in unconditional sales. The uncertainty as to the proper contour of patent exhaustion casts a significant legal cloud over patent licensing practices in the modern economy and has emerged as a central subject in scholarly debates on the nature and scope of intellectual property rights.

This Article takes a normative approach to patent exhaustion and argues that the correct rule on exhaustion should be a "default-plus" rule, a rule that combines a default-rule component with a patent misuse test that is independent of the exhaustion analysis. The default-rule component allows patentees to avoid exhaustion through express patent restrictions, while the patent misuse test ensures that such restrictions do not violate public policy. This Article contends that this default-plus rule is superior to the mandatory rule in terms of theoretical foundation, malleability, and circumvention. Adopting this default-plus rule would go a long way towards minimizing legal impediments to socially beneficial patent restrictions while preserving maximum flexibility in accommodating new technologies and licensing practices yet to come.

## Other IP Topics

### **Patents, technical standards and FRAND license offerings under Brazilian law**

Denis Borges Barbosa (Pontifícia Universidade Católica do Rio de Janeiro)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576956](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576956)

The matter of RAND or FRAND licences in connection to patents deemed to be essential to the establishment of some technical standards, and subject to the rules of some Standard Setting Organizations (SSO) is a much discussed legal issue. At this moment this theme is reviewed by the courts of a number of different jurisdictions. As it also concerns some legal actions under course in Brazil, this study covers the aspects of local law that might be pertinent to such an issue.

### **Agricultural biotechnology: drawing on international law to promote progress**

J. Janewa OseiTutu (Florida International University (FIU) – College of Law)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2574093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574093)

In *Bowman v. Monsanto*, the Supreme Court declined to apply the principle of exhaustion to limit the patentee's ability to control the reproduction of self-replicating inventions. This decision was justified from a patent law perspective on the basis that patent holder has a right to prevent others from making the invention. But what happens when we take other perspectives into account? For instance, a farmer might have human rights or other rights that may need to be balanced against the patentee's right. Since globalized intellectual property standards were established through international agreements and much of the resistance to intellectual property laws is taking place at the international level, this Article turns to international law for guidance. Taking into consideration the competing regimes that touch on intellectual property rights, this Article concludes that we must continue to look for solutions within intellectual property law itself.

#### **About the editor**

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